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China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–2810–11 OF 2012 AND W-02–2727–11 OF 2012
AZIAH ALI, HAMID SULTAN AND UMI KALTHUM JJCA
9 MAY 2014

Civil Procedure — Pleadings — Material facts — Plaintiff's claim alleged defendant breached contract by divulging 'confidential information' to third parties — Plaintiff failed to identify what information disclosed and whether such information 'confidential' — Whether plaintiff failed to prove case — Whether plaintiff's failure to identify what 'information' breached deprived defendant of defences under contract — Whether trial court should have struck out plaintiff's claim in limine for procedural shortcomings

The respondent ('DCX') had signed an agreement with the first appellant ('CRBC') under which in return for DCX securing for CRBC the award for the construction of the Second Penang Bridge project ('the project'), CRBC would pay DCX 3% of the total value of the award and also grant DCX a sub-contract on 20% of the awarded contract. Under the agreement, CRBC, with DCX's support and assistance, was responsible for submitting the proposals for the project to the Government of Malaysia. Despite the submission of several proposals, CRBC failed to secure the project. Subsequently, CRBC merged with China Harbour Engineering Corp ('China Harbour') which was the third defendant in the suit before the High Court. As a result of the merger, CRBC became a subsidiary of China Communications Constructions Group Ltd ('China Communications'), the fourth defendant in that suit. CRBC released information on matters contained within its own draft design proposal for the project to China Harbour which subsequently was awarded a part of the project. In the suit before the High Court, DCX contended that CRBC had released to China Harbour confidential information concerning the project in breach of cl 7 of their agreement and that as a result it had suffered loss of more than RM60m. Although it raised various allegations against all the four defendants in the suit below, DCX did not serve the writ on China Harbour and China Communications. In addition to praying for general damages under various causes of action, DCX in the suit below, inter alia, sought declarations that CRBC was in breach of its contractual obligations and that the second appellant ('HRA Teguh') had induced the breach of contract and/or misappropriated and/or infringed copyrights of plans for the project prepared with the assistance of DCX. The suit also prayed for an order that CRBC and HRA Teguh pay DCX a sum equivalent to 23% of the value of the project awarded to China Harbour and China Communications and their consortium

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partners. CRBC and HRA Teguh appealed separately to the Court of Appeal against the High Court's decision to allow DCX's claim.

Held, allowing the appeals and setting aside the decision of the High Court:

(1) DCX had failed to prove its case against the appellants. It was essential for DCX to have disclosed in its pleadings what 'information' which was disclosed was breached. The court was unable to identify what was handed over by DCX to CRBC under the cover of 'information' or 'confidential information' and what was the precise 'information' which was said to have been breached. The word 'information' had a specific meaning and jurisprudence. All statements or correspondence made by DCX could not qualify as 'information'; neither could a part of the proposal per se qualify as 'information'. A part of the proposal for the project could not be assumed to be DCX's property until it was established under the law that it fell under cl 7. In addition, 'information' per se was not entitled to 'confidential' status under the agreement between the parties. The statement of claim should have defined with some precision the information or communication which was alleged to have been confidential (see paras 21, 31, 32 & 35).

(2) DCX's failure to identify the 'information' in its pleadings made it difficult for CRBC to rely on the contractual defences and/or exceptions stated in cl 7.2 of the agreement, thus breaching the 'fairness rule' in the litigation process and attracting the operation of s 114(g) of the Evidence Act 1950 (see para 19).

(3) Clause 7 of the agreement protected confidential information. But it did not prohibit the intellectual property of CRBC or of DCX (if any) from being given to third parties. What cl 7 attempted to do was state that 'confidential information' received by the other party should not be divulged. There was no prohibition against each party divulging their own 'confidential information'. It was not clear from the pleadings what information DCX had supplied to CRBC under the cover of 'confidential information'. From the evidence and submission it was clear that what had been circulated to HRA Teguh and China Harbour were not the complete documents which were submitted to the Government of Malaysia which came within the definition of 'proposal'. In addition, DCX was fully aware of the release of the relevant documents to HRA Teguh and China Harbour and all with good reasons (see paras 18 & 22).

(4) The trial judge should have dismissed the claim in limine or should have only dealt with the issue of breach of contract against CRBC. Four defendants were sued and the third and fourth defendants were not served with the writ; neither was the pleadings amended to show that the action was only between the first and second defendants. As a result, the pleadings were caught by the prolixity rule and the trial judge ought to

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have directed that the pleadings be amended and/or be struck out in limine. The claim should also have been dismissed under the rule that the plaintiff should not be allowed to prove its case against non-parties, that too when the pleadings said 'nasty things' about the third and fourth defendants to demean their integrity. By naming them and not serving them was abhorrent to the notion of justice and fair play. It was the court's duty to ensure the trial process was not abused whether or not there was objection taken by the party concerned. Without the pleadings being amended, the plaintiff could not have proved each and every head of the pleadings where the third and fourth defendants had been dragged in. It was a cardinal rule of evidence that he who alleged had to prove his case by evidence against the parties to the suit and not against non-parties (see paras 29(a)(i), (ii) and (iii)).

(5) The factual matrix of DCX's role to some extent fell within illustration (f) to s 24 of the Contracts Act 1950. Illustration (f) was very significant to arrest any form of impropriety by touts or 'self-confessed peddlers' — as in the instant case — in the affairs of government. It was the court's duty to be vigilant and to consider whether the consideration or object of an agreement was void on grounds of public policy irrespective of whether or not parties had pleaded it or taken it up as an issue (see paras 16–17).

[Bahasa Malaysia summary

Responden ('DCX') telah menandatangani perjanjian dengan perayu pertama ('CRBC') di mana sebagai pulangan untuk DCX memperoleh bagi CRBC award untuk pembinaan projek Jambatan Pulau Pinang Kedua ('projek tersebut'), CRBC akan membayar DCX 3% daripada keseluruhan nilai award itu dan juga memberikan DCX satu subkontrak berdasarkan 20% daripada kontrak yang diawardkan. Di bawah perjanjian itu, CRBC, dengan sokongan dan bantuan DCX, adalah bertanggungjawab untuk mengemukakan cadangan-cadangan untuk projek tersebut kepada Kerajaan Malaysia. Walaupun beberapa cadangan telah dikemukakan, CRBC telah gagal memperoleh projek tersebut. Berikutan itu, CRBC telah bergabung dengan China Harbour Engineering Corporation ('China Harbour') yang merupakan defendan ketiga dalam guaman di hadapan Mahkamah Tinggi. Akibat daripada penggabungan itu, CRBC menjadi subsidiari kepada China Communications Constructions Group Ltd ('China Communications'), defendan keempat dalam guaman tersebut. CRBC telah mendedahkan maklumat berhubung perkara-perkara yang terkandung dalam draf cadangan rekabentuknya sendiri bagi projek tersebut kepada China Harbour yang kemudian telah diawardkan sebahagian daripada projek tersebut. Dalam guaman di hadapan Mahkamah Tinggi, DCX berhujah bahawa CRBC telah mendedahkan kepada China Harbour maklumat sulit berkaitan projek tersebut yang melanggar fasal 7 kepada perjanjian mereka dan bahawa akibat

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daripada itu ia telah mengalami kerugian lebih RM60 juta. Walaupun ia telah menimbulkan pelbagai dakwaan terhadap kesemua empat defendan dalam guaman tersebut, DCX tidak menyampaikan writ ke atas China Harbour dan China Communications. Selain daripada memohon untuk ganti rugi am di bawah pelbagai kausa tindakan, DCX dalam guaman tersebut, antara lain, memohon deklarasi-deklarasi bahawa CRBC telah melanggar obligasi-obligasi kontraktualnya dan bahawa perayu kedua ('HRA Teguh') telah menyebabkan pelanggaran kontrak dan/atau menyalahguna dan/atau melanggar hak cipta berhubung rancangan-rancangan untuk projek tersebut yang disediakan dengan bantuan DCX. Guaman itu juga memohon untuk perintah agar CRBC dan HRA Teguh membayar DCX jumlah yang sama dengan 23% daripada nilai projek tersebut yang telah diawardkan kepada China Harbour dan China Communications dan rakan-rakan kongsi konsortium mereka. CRBC dan HRA Teguh telah merayu secara berasingan kepada Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi untuk membenarkan tuntutan DCX.

Diputuskan, membenarkan rayuan-rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) DCX telah gagal membuktikan kesnya terhadap perayu-perayu. Adalah penting untuk DCX menunjukkan dalam plidingnya 'information' apa yang didedahkan yang telah dilanggari. Mahkamah tidak dapat mengenal pasti apa yang diserahkan oleh DCX kepada CRBC di bawah perlindungan 'information' atau 'confidential information' dan 'information' yang tepat yang dikatakan telah dilanggari. Perkataan 'information' mempunyai maksud dan jurisprudens yang spesifik. Semua kenyataan atau surat-menyurat yang dibuat oleh DCX tidak layak dianggap sebagai 'information'; ia juga bukan sebahagian daripada cadangan *per se* 'layak dianggap sebagai 'information'. Sebahagian daripada cadangan untuk projek tersebut tidak boleh dianggap hartanah DCX sehingga dibuktikan di bawah undang-undang bahawa ia terangkum di bawah fasal 7. Tambahan pula, 'information' *per se* tidak layak mendapat status 'confidential' di bawah perjanjian antara pihak-pihak itu. Penyataan tuntutan hendaklah mentafsirkan dengan tepat maklumat atau perhubungan yang dikatakan adalah sulit (lihat perenggan 21, 31, 32 & 35).

(2) Kegagalan DCX untuk mengenal pasti maklumat dalam pliding menjadikannya sukar untuk CRBC bergantung kepada pembelaan kontraktual dan/atau pengecualian yang dinyatakan dalam fasal 7.2 perjanjian, oleh itu pelanggaran 'fairness rule' dalam proses litigasi dan membangkitkan operasi s 114(g) Akta Keterangan 1950 (lihat perenggan 19).

(3) Fasal 7 kepada perjanjian melindungi maklumat sulit. Namun ia tidak

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menghalang harta intelek CRBC atau DCX (jika ada) daripada diberikan kepada pihak ketiga. Apa yang cuba dilakukan oleh fasal 7 adalah untuk menyatakan bahawa 'confidential information' yang diterima oleh pihak lain tidak patut didedahkan. Tiada halangan terhadap setiap pihak untuk mendedahkan 'confidential information' mereka sendiri. Adalah tidak jelas daripada pliding apakah maklumat yang telah diberikan oleh DCX kepada CRBC di bawah perlindungan 'confidential information'. Berdasarkan keterangan dan penghujahan ia adalah jelas bahawa apa yang diedarkan kepada HRA Teguh dan China Harbour bukan dokumen-dokumen lengkap yang telah dikemukakan kepada Kerajaan Malaysia yang teragkum dalam definisi 'proposal'. Tambahan pula, DC menyedari tentang pendedahan dokumen-dokumen kepada HRA Teguh dan China Harbour dan semuanya adalah dengan sebab-sebab yang baik (lihat perenggan 18–22).

(4) Hakim perbicaraan patut menolak tuntutan *in limine* atau hanya patut menangani isu pelanggaran kontrak terhadap CRBC. Keempat-empat defendan tersebut telah disaman dan defendan-defendan ketiga dan keempat tidak diserahkan writ; dan pliding juga tidak dipinda untuk menunjukkan bahawa tindakan itu hanya antara defendan-defendan pertama dan kedua. Akibat daripada itu, pliding itu terikat oleh rukun hal bertele-tele dan hakim perbicaraan sepatutnya mengarahkan bahawa pliding tersebut dipinda dan/atau dibatalkan *in limine*. Tuntutan itu juga patut ditolak di bawah rukun itu bahawa plaintif tidak patut dibenarkan untuk membuktikan kesnya terhadap mereka yang bukan pihak-pihak, itu juga apabila pliding itu menyatakan 'nasty things' tentang defendan-defendan ketiga dan keempat untuk merendahkan integriti mereka. Dengan menamakan mereka dan tidak menyampaikan ke atas mereka adalah menghina terhadap tanggapan keadilan yang saksama. Adalah kewajipan mahkamah untuk memastikan proses perbicaraan tidak disalahgunakan sama ada atau tidak terdapat bantahan yang dibuat oleh pihak berkenaan. Tanpa pliding itu dipinda, plaintif tidak mungkin dapat membuktikan setiap dan semua tajuk utama pliding di mana defendan-defendan ketiga dan keempat telah diheret masuk. Adalah rukun kardinal berhubung keterangan bahawa dia yang dikatakan telah membuktikan kesnya melalui keterangan terhadap pihak-pihak kepada guaman dan bukan terhadap mereka yang tidak berkenaan (lihat perenggan 29(a)(i), (ii) dan (iii)).

(5) Matriks faktual berhubung peranan DCX sedikit sebanyak terangkum dalam ilustrasi (f) kepada s 24 Akta Kontrak 1950. Ilustrasi (f) adalah jelas untuk menangkap apa-apa bentuk kelakuan salah oleh 'tous atau 'self-confessed peddlers' — seperti dalam kes ini — dalam urusan kerajaan. Adalah kewajipan mahkamah untuk berwaspada dan untuk mengambil kira sama ada balasan atau objek perjanjian adalah terbatal atas alasan polisi awam tanpa mengambil kira sama ada atau tidak

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pihak-pihak telah mempli atau telah mengemukakannya sebagai suatu isu (lihat perenggan 16–17).] A

Notes

For cases on Material Facts, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6796–6811. B

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd) C
Blay v Pollard & Morris [1930] 1 KB 628, CA (refd)
Diamond Tylus Co Ltd v Bauden Precision Diamonds Ltd [1972] FSR 177 (refd)
Industrial Furnaces v Reeves [1970] RPC 605 (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
John Zink Co Ltd v Wilkinson and Another 3 [1973] FSR 1, CA (refd) D
Kong Ming Bank Berhad v Leong Ho Yuen [1982] 2 MLJ 111, FC (refd)
Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holding Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501; [2007] 4 CLJ 725, FC (refd)
National Coal Board v Wim Neil & Son (St Helens) Ltd [1984] 1 All ER 555, QBD (refd) E
Ocular Sciences Ltd v Aspect Vision Care Ltd [1997] RPC 289 (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293, FC (refd)
Pertamina v Kartika Ratna Tahir & Ors [1983] 1 MLJ 136; [1982–1983] 1 SLR 351 (refd) F
Victoria Laundry (Windsor) Ltd v Newman Industry Ltd [1949] KB 528, CA (refd)

Legislation referred to G

Contracts Act 1950 s 24(f)
Evidence Act 1950 ss 101, 114(g)

Appeal from: Civil Suit No S4–22–22 of 2008 (High Court, Kuala Lumpur) H

Cecil WM Abraham (Sunil Abraham and Grace Khoo Mei Yen with him) (Zul Rafique & Partners) for the first appellant.
Porres Royan (Vishnu Kumar, Leong Cheok Keng and Poh Choo Hoe with him) (Rajpal, Firah & Vishnu) for the second appellant.
Robert Lazar (Prem Ramachandran and Aarthi Jayarajah with him) (Kumar Partnership & SN Yap & Associate) for the respondent. I

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Hamid Sultan JCA (delivering judgment of the court):

[1] The appellants ('first and second defendants') appeal against the decision of the learned High Court judge favouring the respondent's ('plaintiff') claim and ordering damages to be assessed relating to a contingent contract; anchored on success basis (getting it from the Government of Malaysia), came up for hearing on 19 November 2013 and 15 January 2014. Upon hearing the parties we reserved judgment to a date to be fixed. My learned sisters Aziah bt Ali JCA and Umi Kalthum bt Abdul Majid JCA have read the draft judgment and approved the same. This is our judgment.

[2] At the outset we must say that the trial courts must be vigilant not to provide any relief on contracts which is void on the grounds of public policy, or illegality or 'Metramac scenario', etc; whether or not it is the pleaded case of the parties or whether the issue was raised during the trial. The case of *Blay v Pollard & Morris* [1930] 1 KB 628 where Scrutton LJ observed:

> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.

which has been followed in a number of local cases will not stand to tie the hands of judges to deal with the above issues, or arrest impropriety on its own motion at limine (see *Pertamina v Kartika Ratna Tahir & Ors* [1983] 1 MLJ 136; [1982–1983] 1 SLR 351; *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holding Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501; [2007] 4 CLJ 725).

PARTIES

[3] This appeal involves the first and second defendants only. Even though the third and fourth defendants are material parties to the case as per the pleadings, the respondent had chosen not to serve the cause papers on the third and fourth defendants and subsequently it was struck out. The first defendant's appeal no is W-02–2810–11 of 2012 and the second defendant's appeal number is W-02–2727–11 of 2012. The prayers in the amended statement of claim read as follows:

(a) a declaration that the first defendant breached its obligations to the plaintiff as set out in the memorandum of agreement dated 27 November 2002 and the supplemental agreement dated 23 November 2004;

(b) a declaration that the second defendant is liable for inducement to breach the memorandum of agreement dated 27 November 2002 and the supplemental agreement dated 23 November 2004 and/or

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misappropriation and/or infringement of copyrights of the plans prepared with the assistance of the plaintiff;

(c) an order that the first defendant and/or second defendant pay or procures a payment to the plaintiff of a sum equivalent to 3% of the total contract value of the portion of the project executed and/or awarded to the third and/or fourth defendants and their consortium partners;

(d) an order that the first defendant and/or second defendant pay the plaintiff an additional sum equivalent to the value of 20% of the total contract value of the portion of the project executed and/or awarded to the third and/or fourth defendants and their consortium partners less the amount found payable in item (c) above together with any reasonable project management fees;

(e) general damages to be assessed by the registrar;(e) general damages to be assessed by the registrar;

(f) interest at the rate of 5%pa from the date of breach of the memorandum of agreement dated 27 November 2002 and the supplemental agreement dated 23 November 2004 or from 8 January 2007 to the date of full satisfaction of the judgment sum;

(g) an inquiry be ordered as to the monies utilised or received by the second defendant and payment of the sums found due on the account being taken and an order that such monies be paid by the first defendant and/or second defendant to the plaintiff;

(h) further and/or in the alternative, the plaintiff prays for the following orders against the first defendant:

(i) general damages arising from breach of contract;

(ii) general damages arising from negligence;

(iii) general damages arising from breach of trust;

(iv) general damages arising from conspiracy to defraud the plaintiff;

(v) costs; and

(vi) any further relief as the honourable court deems fit.

(i) Further and/or in the alternative, the plaintiff prays for the following orders against the second defendant:

(i) general damages arising from inducement to breach contract (including but not limited to the memorandum of agreement dated 27 November 2002 and the supplemental agreement dated 23 November 2004) and/or arising from unlawful interference with business interest of the plaintiff;

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(ii) general damages arising from misappropriation of the proposal and/or the plaintiff's legal, equitable and/or proprietary rights through deceptive means;

(iii) general damages arising from conspiracy to defraud the plaintiff;

(iv) costs; and

(v) any further relief as the honourable court deems fit.

[4] It must be noted that the plaintiff is not seeking a declaration that there was breach of 'information' or 'confidential information' pursuant to cl 7 of the memorandum of agreement, even though much was said by the plaintiff on this issue (see *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293).

BRIEF FACTS

[5] The learned trial judge has written a 54 page judgment setting out the facts and salient issues. We are of the considered view much judicial time should not be spent to regurgitate the facts save as to the core issues.

[6] By a memorandum of agreement (memorandum) between the plaintiff and the first defendant dated 27 November 2002 and a supplemental agreement dated 23 November 2004 (to extend the first until 26 November 2006), the plaintiff had agreed to secure the 'Penang second Bridge Project' (project). In essence, it was a term that the first defendant with the support and assistance of the plaintiff will submit the proposal to the Government of Malaysia. In the event the proposal is accepted the first defendant by itself or others will construct and implement the project. The reward for the plaintiff is that if the first defendant is awarded the project the first defendant must pay the plaintiff 3% of the total value of the project awarded to the first defendant. And in addition 20% of the awarded contract will be sub-contracted to the plaintiff. In short, the reward for the plaintiff was on a success basis.

[7] Based on the 'memorandum', several proposals were submitted by the first defendant but were not successful. In December 2005 the first defendant merged with the third defendant and became subsidiary of the fourth defendant. The first defendant released with tacit consent of the plaintiff the information related to their own proposal to the third defendant and in 2006 some part of the project was awarded to the third defendant.

[8] It was the first defendant's case that what was released was not the proposal as defined in the agreement. What was released was related to the first defendant as the owner of the said 'Draft Design Proposal'.

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[9] As a result, the plaintiff says in consequence of release of the purported information it had suffered a loss in excess of RM60m and filed an action against the four defendants. And the pleaded case is against the four defendants and without any amendments in respect of parties the learned judge had determined the claim.

[10] Before the High Court the issues to be tried read as follows:

First Defendant

1 Whether the plaintiff carried out work to assist and support the first defendant's proposal to the Malaysian Government with regard to the said project through the actions as pleaded in paragraph 9 of the Amended Statement of Claim.

2 Whether the help and support of the plaintiff enabled the first defendant to submit the Concept Paper to the Prime Minister's Department as an initial presentation of the said project and/or the background to the said project.

3 Whether the particulars and/or the contents of the Preliminary Technical Proposal ('the said Proposal') submitted on 22 December 2004 are of the same proposal defined in the Principal Agreement between the plaintiff and the first defendant.

4 Whether the proposal submitted by the first defendant to the Malaysian Government on 17.5.2004 is a resubmission of the said proposal submitted on 22 December 2004.

5 Whether the plaintiff possesses the legal and proprietary rights rover the said proposal and whether the first defendant is a trustee of such legal and proprietary rights and hence the first defendant owes a duty of care.

6 Whether the said proposal constitutes 'confidential information' as defined in the Principal Agreement entered into between the plaintiff and the first defendant.

7 Whether the plaintiff had knowledge and/or gave permission and consent to the first defendant to forward a copy of the said proposal to the second defendant and third defendant around January 2006.

8 Whether the grounds contained in the first defendant's letter dated 20 February 2006 amount to a breach of contract by the first defendant for forwarding a copy of the said proposal to the third defendant.

9 Whether at all material times the plaintiff has agreed and given permission to the first defendant to forward a copy of the said proposal to the second defendant in order to the second defendant to tie up with the first defendant and not the third defendant.

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10 Whether the first defendant's letter dated 20February 2006 is an admission to a breach of the implied terms under the Principal Agreement or the supplemental agreement between the plaintiff and the first defendant.

11 Alternatively, assuming it was done without the permission or approval or acquiescence of the plaintiff whether the first defendant breached the contract unlawfully, improperly, negligently or otherwise wrongfully towards the plaintiff when it forwarded a copy of the said proposal to the second defendant and third defendant.

12 Whether the first defendant caused the plaintiff to lose its right and interests under the Principal Agreement and/or Supplemental Agreement when the first defendant divulged the said proposal to the second defendant and third defendant.

13 Whether the first defendant acted in breach of the terms and conditions of the said Agreements including but not limited to clauses 3(ii), 3(iv) and 4.6, 5.2, 7.1 and 7.2 of the said Principal Agreement and the Supplemental Agreement.

14 Whether the first defendant breached any of its duties to the plaintiff under the Principal Agreement and the Supplemental Agreement.

15 Whether the first defendant colluded and/or conspired with the second, third and fourth defendants to deceive and to deprive the plaintiff of any participation in and benefit or profits arising from the said project.

16 Whether the first defendant colluded and/or conspired with the second, third and fourth defendants dishonestly, unlawfully and/or fraudulently to deprive the plaintiff of any rights and/or interests under the Principal Agreement and the Supplementary Agreement.

Second Defendant

1 Samada plaintif memiliki hak undang-undang dan ketuanpunyaan ke atas Deraf Cadangan rekaan bertarikh November 2003 ('Cadangan tersebut').

2 Samada Defendan Kedua mempunyai pengetahuan atau terikat oleh milikan undang-undang dan ketuanpunyaan plaintif (sekiranya ada) atas cadangan tersebut.

3 Samada Defendan Kedua dan/atau penama/wakilnya dan/atau syarikat-syarikat yang bersekutu dengan Defendan Kedua telah secara salah dan tanpa kebenaran plaintif memperolehi/meminta Cadangan tersebut dari Defendan Pertama dan menyalahgunakan cadangan tersebut bagi memperolehi project tersebut.

4 Samada Defendan Kedua bersama-sama dengan Defendan Ketiga telah menghantar cadangan tersebut kepada Kerajaan Malaysia bagi memperolehi projek pembinaan jambatan kedua Pulau Pinang (projek tersebut).

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5 Samada Defendan Kedua merupakan pemegang amanah dan/atau pemegang konstruktif cadangan tersebut bagi pihak plaintif.

6 Samada Defendan Kedua telah memungkiri kewajipannya sebagai pemegang amanah dan/atau pemegang amanah konstruktif kepada plaintif dengan meperolehi dan menyalahgunakan cadangan tersebut tanpa kebenaran plaintif.

7 Samada Defendan Kedua telah membuat representasi, salah nyata dan memperdayakan Defendan Pertama menyerahkan cadangan tersebut kepada Defendan.

8 Samada Defendan Kedua telah memperolehi cadangan tersebut daripada Defendan Pertama dengan kebenaran plaintif.

9 Samada Defendan Kedua berada dalam kedudukan untuk mendapatkan projek tersebut dan menghalang dan/atau mengecualikan plaintif dan Defendan Pertama daripada menyertai projek tersebut.

10 Samada Defendan Kedua mempunyai pengetahuan tentang penglibatan dan usaha-usaha plaintif melakukan kerja-kerja membantu dan menyokong Defendan Pertama dalam penyediaan cadangan tersebut (sekiranya ada).

11 Samada Defendan Kedua telah memungkiri kewajipannya sebagai pemegang amanah dan/atau pemegang amanah konstruktif kepada plaintif (sekiranya ada) dengan menyalahgunakan cadangan tersebut dengan mengemukakan semula cadangan tersebut bersama dengan Defendan Ketiga kepada Kerajaan Malaysia di bawah nama dan gaya Defendan Kedua dan Defendan Ketiga.

12 Samada pengarah Defendan Kedua, Dato' Latif telah meminta supaya Defendan Pertama mengeluarkan satu surat keterbelakang ('backdated letter') untuk disampaikan oleh Defendan Kedua kepada Perdana Menteri bagi mendapatkan satu perjanjian Usahasama ditandatangani di antara Defendan Pertama dan Defendan Kedua bagi memperolehi projek tersebut.

13 Samada Defendan Kedua telah berjanji dan membuat representasi bahawa akan mengeluarkan Defendan Ketiga daripada perjanjian Usahasama tersebut.

14 Samada Defendan Kedua mempunyai pengetahuan yang sepenuhnya mengenai posisi dan peranan Encik Khairuddin Sidek di dalam syarikat plaintif pada semua masa yang material.

15 Samada plaintiff dan/atau Khairuddin Sidek selaku agen plaintif, berurusan dengan Defendan Kedua dengan niat jahat dan/atau tujuan/motif tersembunyi dalam cubaan untuk mengikut atau mengaitkan Defendan Kedua dengan consortium/kerjasama yang dikatakan wujud di antara plaintif dan Defendan Pertama (sekiranya ada).

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16 Samada Defendan Kedua bersama dengan Defendan Ketiga dan Defendan Keempat telah berkonspirasi (conspired) untuk memastikan bahawa plaintif tidak dilibatkan dan tidak mempunyai peranan dalam projek tersebut.

17 Samada akibat daripada konspirasi di antara Defendan Kedua dengan Defendan Ketiga dan Defendan Keempat telah menafikan plaintif daripada menikmati apa-apa keuntungan (samada dari segi kewangan atau selainnya) yang berbangkit dan/atau yang mungkin berhasil daripada projek tersebut.

[11] The memorandum of appeal of the first appellant reads as follows:

First Defendant

1 The learned judge erred in law in construing and/or interpreting the memorandum of agreement dated 27 November 2002 ('the Agreement').

2 The learned judge erred in law and in fact in failing and/or neglecting to apply the correct principles of law with regard to the construction and/or the interpretation of inter-alia, Clause 1, Clause 4, Clause 6 and Clause 7 of the Agreement.

3 The learned judge erred in law and in fact in failing and/or neglecting to apply the correct principles of law with regard to the construction and/or the interpretation of Clause 7.1 and Clause 7.2 of the Agreement in neglecting to judicially appreciate adequately and/or at all, inter alia, the following:

3.1 The meaning of the term 'confidential information' and the obligations owed by the respondent to the appellant therein;

3.2 The respondent admitted that it did not contribute to the drafting, preparation and/or completion of the proposal;

3.3 The respondent had no involvement and/or did not contribute to drafting, preparation and/or completion of any technical information, financing structure and/or drawings contained in the proposal;

3.4 The respondent did not submit the proposal to the Government of Malaysia for consideration and/or approval;

3.5 The information contained in the proposal is the property of the appellant in accordance with the express provisions of Clause 4.6 of the Agreement;

3.6 There was no objection by the Respondent when informed by the appellant that the proposal had been forwarded to China Harbour Engineering Corporation and/or HRA Teguh Sdn Bhd;

3.7 The respondent consented to the proposal being forwarded

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to China Harbour Engineering Corporation and/or HRA Teguh Sdn Bhd;

3.8 The contractual obligations imposed on the respondent under the Agreement with particular regard to Clause 7 of the said Agreement; and

3.9 The contractual obligations imposed on the appellant under the Agreement with particular regard to Clause 7 of the said Agreement.

4 The learned judge erred in law and in fact in failing and/or neglecting to apply the correct principles of law with regard to the construction and/or the interpretation of Clause 7.1. and Clause 7.2 of the Agreement in neglecting to judicially appreciate adequately and/or at all the fact that the respondent had failed to establish the following requirements in law vis-a-vis, a cause of action for breach of confidence:

4.1 The material communicated by the respondent to the appellant had the necessary quality of confidence;

4.2 The material communicated or that became known to the appellant by the respondent was in respect of circumstances entailing an obligation of confidence; and

4.3 There was unauthorised use of that material on the part of the appellant.

5 The learned judge was plainly wrong in concluding that the respondent had provided direct assistance and/or support vis-a-vis, the proposal prepared by the appellant. The learned judge erred by virtue of the following:

5.1 The learned judge disregarded the fact that the duties and responsibilities of the respondent pursuant to the Agreement was only to assist in lobby the Government of Malaysia and/or act as an introducer in respect of the construction of the second bridge in Penang ('the Project');

5.2 The learned judge wrongly concluded that the respondent had adduced sufficient evidence to establish that it was predicated on the efforts and contributions of the respondent that led to the preparation of the Concept Paper and the Proposal notwithstanding the oral evidence and contemporaneous evidence before the High Court;

5.3 The learned judge failed to take cognisance of the following facts:

(a) As the proposal was initially submitted by the appellant in 22 December 2004 and 17 May 2004, no response was received from the Government of Malaysia;

(b) The respondent was aware of this fact as they extended the agreement

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to a further two (2) years via the supplemental agreement dated 23 November 2004; and

(c) The respondent was informed by the appellant of the distribution of the proposal to HRA Teguh Sdn Bhd ('second Defendant in the High Court') and China Harbour Engineering Corporation.

6 The learned judge was plainly wrong in concluding that the appellant breached the terms and conditions of the Agreement.

7 The learned judge erred in law and in fact in concluding that there is a 'trust' relationship between the appellant on the one part and the respondent on the other part.

8 The learned judge erred in law in failing to take cognizance of the fact that the elements of what constitute a trust, namely:

8.1 An express intention to create a trust was absent;

8.2 The subject matter of the alleged trust was not readily determinable; and

8.3 The objects of the trust were not readily determinable.

9 The learned judge erred in law and fact in concluding that the appellant was negligent and/or conspired to perpetrate a fraud and/or was a party to an inducement to breach to the Agreement for the following reasons:

9.1 The learned judge failed to judicially appreciate the act that the respondent failed to plead any and/or proper particulars of negligence, conspiracy to commit fraud and/or inducement to breach the agreement vis-a-vis, the appellant;

9.2 The learned judge failed to take due cognisance of the fact that the respondent failed to discharge the necessary burden of proof vis-a-vis a claim in negligence, conspiracy to commit fraud and/or inducement to breach the agreement;

9.3 The learned judge failed to take due cognisance of the undisputed fact that the claim against China Harbour Engineering Corporation and China Communications Constructions Group Ltd was struck out such that the alleged co-conspirators were not before the High Court;

9.4 The learned judge failed to take cognisance of the fact that no direct evidence of negligence, conspiracy to commit fraud and/or inducement to breach the agreement was properly led at the trial of this action before the High Court;

9.5 The learned judge failed to take cognisance of the fact that the respondent consented to the proposal prepared by the appellant being forwarded to HRA Teguh Sdn Bhd and China Harbour Engineering Corporation. Accordingly, there was no act of deception on the part of the appellant.

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9.6 The learned judge failed to properly judicially appreciate the evidence before the High Court that the project was awarded to China Harbour Engineering Corporation , a separate and distinct legal entity from the appellant;

9.7 The learned judge failed to judicially appreciate that commercial reality that there was no guarantee that the project would be awarded to the appellant; and

9.8 The learned judge failed to judicially appreciate the fact that the appellant and China Harbour Engineering Corporation were not a party to any profit sharing as a consequence of the project being subsequently awarded to China Harbour Engineering Corporation.

10 The learned judge failed to judicially appreciate the fact that the proposal allegedly submitted by China Harbour Engineering Corporation was not identical to the proposal prepared by the appellant.

11 The learned judge failed and/or neglected to judicially appreciate the true 'commercial reality' or 'business efficacy' of the Agreement wherein:

11.1 The respondent was to act a lobbyist or 'introducer' in an endeavour to assist the appellant to secure the project;

11.2 The respondent simply failed to successfully lobby the Government of Malaysia to award the project to the appellant; and

11.3 There is no guarantee or right to any profits on the part of the respondent as any income is contingent on the project being awarded to the appellant (which did not materialise in this instance).

12 The learned judge was plainly wrong in failing to provide any cogent grounds whatsoever in coming to and/or handing down the Order of the High Court dated 19 October 2012.

Second Defendant

1 The learned judicial commissioner erred in fact and in law in allowing the respondent's/plaintiff's Claim against the appellant/second defendant.

2 The learned judicial commission erred in fact and/or in law in concluding that the appellant/second defendant submitted the said proposal, or an identical proposal as their own or jointly with the third defendant to the Malaysian Government when there was no evidence showing the second defendant submitted the same to the Malaysian Government and for the purposes of obtaining the project.

3 The learned judicial commissioner also failed to take into account whether the second defendant's alleged proposal actually belongs to the second defendant and the failures by the plaintiff to call witnesses to ensure who does the second defendant's alleged proposal belonged to.

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4 The learned judicial commissioner erred in fact and/or in law in concluding the said proposal was given to the second defendant based on the Agreed Facts between the plaintiff and the first defendant when the second defendant was not party to the said Agreed Facts and also considering evidence and/or testimony shown at trial that the second defendant never received the said proposal or it was doubtful or questionable whether the said proposal was ever given to the second defendant or even requested by the second defendant.

5 The learned judicial commissioner erred in fact and/or in law in concluding that the second defendant used the said proposal to obtain the project when there is no evidence to show that the seconddefendant got the project - and - no evidence to show that the second defendant obtained the project based on the said proposal or on an identical proposal;

6 The learned judicial commissioner erred in fact and/or in law in concluding that the second defendant obtained the project considering it was Jambatan Kedua Sdn Bhd who actually got the whole project. The learned judicial commissioner failed to appreciate the open tender issue namely it relates to the second defendant obtaining the interchange job only at the main land and not the entire project and not related to the said proposal. Further, the learned judicial commissioner failed to appreciate that the interchange job was obtained 2 years after the filing of this action and it was never pleaded by the plaintiff.

7 The learned judicial commissioner erred in fact and/or in law in concluding that the second defendant unlawfully interfered in the plaintiff's business or the principal and supplementary Agreements considering the plaintiff failed to plead it considering the ingredients of unlawful interference of the plaintiff's business or on the principal and supplementary Agreements are not fulfilled.

8 The learned judicial commissioner erred in fact and/or in law in concluding that the second defendant and the other defendants deceived and unlawfully obtained the said proposal and/or misappropriated the plaintiff's rights in the said proposal and to deprive the plaintiff of any benefits or interest in the said project when there is no such evidence to support such conclusion. The learned judicial commissioner also erred in fact and in law in concluding that the second defendant and the other defendants deceived, fraudulently conspired and/or concluded to deprive the plaintiff's rights and interest in the project and/or in the principal and supplementary Agreements considering the plaintiff failed to prove beyond reasonable doubt on this issue and considering there is no evidence to show the second defendant informing the Malaysian Government not to award the project to the plaintiff.

9 The learned judicial commissioner erred in fact and/or in law in failing to take into account of the plaintiff's conduct as a whole namely on the plaintiff's failure to confirm in writing on the importance of the February 2006 meeting and the plaintiff's failure to write to the second defendant

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seeking for explanation on the second defendant alleged use and submission of the proposal to the Malaysian Government.

10 The learned judicial commissioner erred in fact and/or in law in concluding that the second defendant had merged with the first defendant when evidence shows to the contrary.

11 The learned judicial commissioner erred in fact and/or in law in concluding and/or in taking into account that the second defendant witness is influential and has political connections with then Prime Minister on the award of the project when there is no evidence to support such conclusion and also failed to appreciate the inconceivability for an individual or a private limited company to dictate or influence a sovereign state as to who should participate in the project and who should get the project.

12 The learned judicial commissioner erred in fact and/or in law that by failing to appreciate the above matters and decided in the plaintiff's favour against the second defendant. Had the learned judicial commissioner took into account the above matters, the learned judge ought to have dismissed the plaintiff's claim.

13 In all the circumstances of the cases and without prejudice to the foregoing, the learned judicial commissioner as a whole erred in law in applying the wrong tests and/or misapplying the relevant principles of law to the facts and circumstances of the case.

PRELIMINARIES

[12] What is essential to note in the 'memorandum' is that the respondent stands in a position of an introducer to broker the deal with Government of Malaysia and not as a partner in providing technical knowledge or skill of any specific nature which can be said that the first defendant did not possess. This is reflected in cl 3 at p 4 of the 'memorandum' in the appeal record which sets out the respondent's representations and warranties, which reads as follows:

Dectra's Representations and Warranties

(i) Dectra is an engineering and construction company limited by shares and incorporated in Malaysia and has the expertise and sufficient knowledge to promote CRBC and is able to assist in matters pertaining to the local content requirements of the project;

(ii) Dectra will render all assistance and input in relation to the lobbying, marketing, promoting, preparation, presentation and submission of the proposal for the project leading to the lawful award of the project to the Consortium and to any other local party or parties as identified by the Government of Malaysia;

(iii) Render all management and advisory services pertaining to applicable local laws and regulations;

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(iv) Dectra agrees to work exclusively with CRBC to promote and achieve the objectives of this Agreement and during the subsistence of this Agreement shall not lobby, market for, deal with or discuss or submit any proposal for the project to the Government of Malaysia or to any other party as directed by the Government of Malaysia or market or lobby or submit any proposal through any other party or parties.

[13] The first defendant's representation and warranties in the 'memorandum' will demonstrate that the first defendant is going to be the sole person having the technical skills, knowledge, financial spread out, etc to submit the proposal and if awarded to complete the project with no hassle or need of any interim broker to assist in technical skills, etc which we have stated above and that part at p 4 of the 'memorandum' reads as follows:

CRBC's Representation and Warranties

(i) CRBC is one of the largest Civil Construction Companies in China and has vast experience in the engineering and construction of infrastructure projects including public transportation systems, bridges and hospitals in China and other parts of the world.

(ii) In respect of the Penang Second Crossing, CRBC has the exclusive backing and support of the Chinese Government and the Chinese Embassy in Malaysia and will in any event lead the Chinese portion of any consortium to be established for the purposes of securing and/or executing the project.

(iii) CRBC has the necessary expertise to and is confident in its ability to implement and complete the project or any part of it.

(iv) CRBC agrees to work exclusively with Dectra to promote and achieve the objectives of this Agreement. CRBC will work with Dectra to identify relevant Malaysian partners that will help facilitate the winning of this project.

[14] Clause 4.6 of the 'memorandum' to some extent provides comfort to the plaintiff to tie the hands of the first defendant not to submit the proposal by itself or through other parties for 24 months or as per the extended period of further 24 months as stated in the supplemental agreement, until 26 November 2006. Clause 4.6 at p 5 of the 'memorandum' reads as follows:

In the event that after twenty-four (24) months from the date of this Agreement or such other extended dates (hereinafter referred to as 'the Exclusive Period') as may be mutually agreed upon by the parties hereto:

(a) the proposal (including any revisions, variations and changes thereto) is not accepted by the Government of Malaysia;

(b) the terms of the Concession Agreement (including any revision, variation and changes thereto) is not accepted by the Government of Malaysia.

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either party may by notice to the other determine the exclusive rights hereby granted and thereafter for the avoidance of doubts, all property rights in relation to design and layout shall at all times vest on CRBC, and nothing contained in this Agreement shall prohibit CRBC or the Consortium from submitting a fresh proposal to the Government of Malaysia for the construction and implementation of the project.

[15] The responsibility of preparing the proposal is with the first defendant. The reading of cl 5 will clearly show that the plaintiff has no role to play officially with the Government of Malaysia but is just trying to earn something out of the deal by 'peddling skills' and the consideration are cosmetic in nature only, though the terms of the agreement attempt to put some form of respectability to the 'memorandum'. Whether on the factual matrix of the case the court should entertain such claim on public policy grounds is a matter which the parties ought to have raised but have not done so and we do not wish to comment save to make some observations. Cases such as *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 which has asserted that the court is not entitled to decide a suit on a matter on which no issue has been raised will not be applicable to tie the hands of the court on its own motion to deal with issues such as public policy or illegality, etc to ensure the public are not short changed by peddlers or touts. These heads fall within the realm and domain of the courts and it is the duty of the court to ensure that judicial process is not abused by touts in relation to government contracts. The said cl 5 at p 6 of the 'memorandum' reads as follows:

5 Preparation, Submission and Negotiation of the Proposal

5.1 The parties hereby agree that Dectra shall be the coordinating entity in Malaysia and CRBC in China for the preparation and submission of the proposal.

5.2 CRBC shall prepare or cause to be prepared the proposal and submit the proposal through Consortium to the Government of Malaysia for its consideration and acceptance.

5.3 Dectra shall provide necessary cooperation and assistance to CRBC in relation to the preparation and submission of the proposal including but not limited to providing information and references as may be required by CRBC in a timely manner.

5.4 Dectra shall provide such cooperation, assistance and support as may be required to facilitate the presentation and discussion of the proposal between CRBC and the Government of Malaysia.

5.5 Both companies agree to bear their own costs save that in the event that the Concession Agreement is executed, any cost and expense that form part of the project costs shall be charged to the Consortium.

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[16] The factual matrix of the role of the plaintiff will to some extent fall within Illustration (f) to s 24 of the Contracts Act 1950. The said part of the section and illustrations reads as follows:

> What considerations and objects are lawful, and what not
>
> 24 The consideration or object of an agreement is lawful, unless:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> Illustrations:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> (f) A promises to obtain for B an employment in the *public service*, and B promises to pay RM1,000 to A. The *agreement is void*, as the consideration for it is unlawful. (Emphasis added.)

[17] We must say Illustration (f) is very significant to arrest any form of impropriety by touts, 'self confessed peddlers', as in the instant case in the affairs of government. It is the duty of the court to be vigilant. It is for the court to consider whether the consideration or object of an agreement is void on the grounds of public policy irrespective of whether parties have pleaded it or not or the issue was taken at the trial court. Though courts are slow in creating 'new heads' of public policy, it cannot fail to recognise the 'heads' which stand as illustrations in particular (f) in the instant case, when it involves the government. Support for proposition and Illustration (f) is found in a number of Indian cases. We do not wish to elaborate as there was no assistance by the learned counsel on this issue.

[18] There is also a provision ie cl 7 to protect confidential information. But what is important is that this provision does not prohibit the intellectual property of the first defendant or the plaintiff (if any) to be given to third parties. What it attempts to do is to state 'confidential information' received by the other party should not be divulged. There is no prohibition to divulge their own 'confidential information'. It is also not clear from the pleading what information the plaintiff had supplied to the first defendant under the 'cover' of

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'confidential information'. The said cl 7 reads as follows:

> 7.1 Each party agrees to keep and procure to be kept confidential all information obtained from the other party pursuant to this Agreement ('Confidential Information').
>
> 7.2 Each party shall not at any time divulge, disclose or otherwise furnish to any third party the Confidential information or any part thereof unless such Confidential Information:
>
> (a) was already in the public domain or becomes so through no fault of the recipient party;
>
> (b) is independently developed by the recipient party;
>
> (c) is approved for release by prior written authorisation by owner of the Confidential Information;
>
> (d) if required by law to disclosed or in connection with legal proceedings by authority of a court of competent jurisdiction.
>
> 7.3 The provision of this Clause 7 shall survive the termination and cessation of this Agreement.

[19] What is important to note in the above cl 7 is that it relates to all 'information'. Information has a specific jurisprudence and meaning and in consequence it will not relate to all letters and correspondence which do not have the character of information. The learned trial judge in her judgment appears not to have taken note of the underlying jurisprudence relating to 'information' and the distinction in relation to correspondence, and the rules of pleading. If the complaint is that information was released, whether that information complained of will fall within the jurisprudence of confidential information is another matter. Further, if the 'information' is not identified by the plaintiff in the pleadings it will be difficult for the first defendant to rely on the contractual defence and/or exception stated in cl 7.2. In consequence the 'fairness rule' in litigation process will be breached and the failure to do so will also attract s 114(g) of the Evidence Act 1950.

[20] Clause 1.1 of the memorandum defines proposal as well as the person who will submit it and reads as follows:

> 'Proposal' means the proposal for the construction and implementation of the project to be submitted by CRBC pursuant to Clause 5 of this Agreement which shall set forth in detail, the scope of works, alignment, design parameters, construction programme, costs, financing plan and any maintenance and operation of the project if so required.

[21] It must be noted that the proposal here has a specific meaning. A part or fraction of what is stated in cl 1.1 will not amount to proposal. And that part

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necessarily need not trigger cl 7 per se. A part of the proposal cannot be assumed to be the property of the plaintiff until it is established under the law that it falls under cl 7.

[22] The learned judge in her judgment says 'upon perusing cll 1.1, 4.6 and 7.1 of the agreement, it is clear that the information contained in the proposal including the concept paper is protected and confidential'. In our considered view taking into consideration the factual matrix of the case it is difficult to even fathom, how the proposal including the concept paper will become 'confidential information' which phrase has jurisprudence as well as sacrosanct effect if parties have not specifically stated so in the 'memorandum'. Though there is a right under the 'memorandum' to say that the proposal should not be utilised for purpose other than stated in the agreement it does not specifically cover 'information', etc which is the intellectual property of the first defendant itself. That is to say the proposal may be by joint efforts but that does not mean intellectual property of each individual cannot be disclosed. The distinction is like apple and orange and need no elaboration. From the evidence and submission it is clear that what had been circulated to second and third defendants were not the complete documents which were submitted to the Government of Malaysia which comes within the definition of proposal. In addition, the respondent was fully aware of the release of the relevant documents to the second and third defendants and all with good reasons. Further, for purpose of assessment of damages the nature of the information and its breach and its effect on the plaintiff is an essential criteria to assess quantum. Technical breaches per se may not entitle damages save to say nominal damages only (see *Victoria Laundry (Windsor) Ltd v Newman Industry Ltd* [1949] KB 528).

[23] The learned counsel for the first defendant's argument that the information released does not breach the obligation of confidence and does not fall within the parameters of confidential information as envisaged by the parties in cl 7.1 of the 'memorandum' has merits. Very importantly in the instant case the identification of the 'confidential information' or for that matter 'information' has not been met (see *John Zink Co Ltd v Wilkinson and Another 3* [1973] FSR 1). On the issue of confidential information there are a number of authorities to support the first defendant's argument. To name a few are as follows:

(a) In *Coco v AN Clark (Engineers) Limited* [1968] FSR 415 where it was stated:

> In cases of contract, the primary question is no doubt that of construing the contract and any terms implied in it. Where there is no contract, however, the question must be one of what it is that suffices to bring the obligation into being; and there is the further question of what amounts to a breach of that obligation.
>
> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of

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Lord Greene, MR in the *Saltman* case on p 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communication it. I must briefly examine each of these requirements in turn.

(b) In *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 stands for the proposition that confidential information may be released in certain circumstances and very importantly where the disclosure is made by the express or implied consent of the customer.

[24] In the instant case, there is sufficient evidence to show that the respondent by its own conduct consented to the idea of forwarding the purported information which it attempts to complain of. A part of the submission of the learned counsel for the first defendant will seal this issue and that part reads as follows:

> (b) The respondent acknowledged that its own 'influence peddling skills' or 'lobbying skills' were not being acknowledged or having an effect on the Government of Malaysia, hence the welcoming of assistance from third parties as well as the position of the appellant that it too was being 'cut-out' of the project:
>
> • Letter from the respondent to the appellant dated 6 February 2006 wherein the following was stated by Mr Hugh Robert on behalf of the respondent:

This is a mega project and it is important that in addition to Dato' Latif, CRBC should find the right consortium partners to ensure this project is seen through to a successful conclusion to the satisfaction of all parties who has supported the Chinese cause from the beginning.

> • Letter from the appellant to the Government of Malaysia dated 1 March 2006; and
>
> • Letter from the appellant to the respondent dated 20 March 2006.
>
> 64 It is pertinent to note that in the written grounds of judgment of the High Court, the contradiction in the respondent's case in relation to the issue of consent by conduct was not addressed by the trial judge. The trial judge in delivering the written grounds of judgment appears to have only considered the evidence in relation to the cross-examine of SD1, the appellant's witnesses and not the totality of the evidence before the High Court, in particular the evidence led by the respondent as the plaintiff in the High Court.
>
> 65 The appellant submits that had the trial judge properly considered the whole of the evidence before the High Court, the trial judge ought not to have concluded that the appellant had breached the agreement

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by forwarding the proposal to HRA and/or CHEC as the consent of the respondent had been obtained.

[25] There are many other issues raised by the learned counsel for the first defendant that have merits and we do not propose to set it out where the principles are trite, save to set out the conclusion of the submission of the learned counsel for the first defendant which is self explanatory and reads as follows:

164 To conclude, the appellant submits that:

(a) The trial judge has erred in law in failing to correctly apply principles of law on construction of the Agreement;

(b) The trial judge failed to judicially appreciate that the appellant is the losing party, just as much as the respondent is, in that:

(i) The project was not awarded to the appellant;

(ii) The agreement did not provide a warranty that both the appellant and respondent will secure the project upon submission of the proposals; and

(iii) The end product of the project is different to the appellant's proposal and to CHEC's proposal.

(c) The trial judge has erred in law in failing to properly judicially appreciate that the respondent's claim in negligence, fraud and conspiracy was not properly pleaded;

(d) The trial judge was plainly wrong in failing to provide any cogent grounds whatsoever in coming to and/or handing down the judgment of the High Court dated 19 October 2012 vis-a-vis the claims for breach of contract, ownership of the proposal, breach of confidentiality, negligence, fraud and/or conspiracy; and

(e) In all the circumstances of the case, the decision of the High Court was erroneous both in law and in fact. The decision of the High Court is manifestly unsafe and ought to be set-aside.

165 Ultimately, from a perusal of the table of errors annexed to this submission as Annexure C it can be seen that the trial judge made a multitude of errors of law and fact in delivering the judgment of the High Court. There can be no clearer case than this, of a judgment of the High Court, being plainly wrong and so manifestly unsafe. Appellate intervention in favour of the appellant herein is clearly warranted.

166 Wherefore, the appellant prays that this appeal be allowed with costs.

SUBMISSION OF THE SECOND DEFENDANT

[26] The learned counsel for the second defendant:

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(a) complains that the failure of bringing the third and fourth defendants notwithstanding the pleaded case involves all four defendants in principle to be fatal;

(b) the information supplied by the first defendant was solely and exclusively the property of the first defendant;

(c) no evidence was led by the plaintiff to show that the second defendant was aware of the memorandum and the second defendant had no knowledge that the plaintiff had any alleged proprietary or other interest in the first defendant's proposal;

(d) no evidence was adduced to say the 'bridge' was constructed based on the first defendant's information which the plaintiff attempts to complain off; and

(e) the plaintiff's claim is premature as there was no cause of action at the date of the institution of the suit held on 8 January 2008.

SUBMISSION OF THE PLAINTIFF

[27] The learned counsel for the plaintiff's submission, inter alia, can be summarised as follows:

(a) the learned judge had correctly interpreted the 'memorandum' in particular cll 1, 4.6 and 7 and says the law concerning interpretation of a contractual agreement is trite. A more current interpretation of the same can be gleaned from the case of *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 in which the Federal Court held that:

> First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract.
>
> Further, the Federal Court adopted the following position stated in an English case of *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 11:
>
> > The court has no power to improve upon the instrument, which it is called upon to construe, whether it is a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, the meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument

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would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed.

(b) Even if there was some ambiguity with respect to the said clauses that ambiguity has to be construed against the first defendant on the ground that the 'memorandum' was prepared by it and relies on the Federal Court decision of *Kong Ming Bank Berhad v Leong Ho Yuen* [1982] 2 MLJ 111, where it was stated:

> The contra proferentem rule referred to by the learned trial judge is derived from the maxim verba forties accipiuntur contra proferentem (words are to be interpreted strongly against him who uses them). The maxim found favour in *TGhrackmerton v Tracy,* and the House of Lords in *Neill v Duke of Devonshire* held to the effect that the words of a deed executed for valuable consideration, are to be construed, as far as they properly may, in favour of the guarantee is subject to the general principle that the instrument must be construed in accordance with the expressed intention.

(c) The first and second defendants did not put SP1 and/or challenge the efforts and/or contribution set out in para 7 of the amended statement of claim which reads as follows:

> (d) A memorandum of agreement dated 27 November 2002 (hereinafter referred to as 'the Principal Agreement'), was signed between the plaintiff and the first defendant. Pursuant to the terms and conditions of the Principal Agreement, the plaintiff and the first defendant expressly or impliedly agreed, inter alia:
>
> (e) The first defendant with the support of the plaintiff would submit to the Government of Malaysia a printed documentary proposal for the construction and implementation of the project.
>
> (f) The first defendant represents itself as having the exclusive support of the Chinese Embassy in Malaysia and will lead the Chinese portion of any consortium to be established for the purpose of securing or executing the project.
>
> (g) The first defendant shall work exclusively with the plaintiff to promote and achieve the objectives of this Agreement. The plaintiff shall identify relevant Malaysian partners that will help facilitate the winning of this project.
>
> (h) The plaintiff shall work exclusively with the first defendant to promote and achieve the objectives of this Agreement and during the subsistence of this Agreement shall not lobby, market for, deal with or discuss or submit any proposal for the project to the Government of Malaysia or to market to lobby or submit any proposal through any other party or parties.
>
> (i) The plaintiff shall be the coordinating entity in Malaysia and the first

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defendant the coordinating entity in China for the preparation and submission of the project.

(j) In the event that the plaintiff and first defendant's proposal is accepted by the Government of Malaysia, the first defendant either by itself or through a special purpose vehicle or jointly with other mainland Chinese companies shall enter into a Concession Agreement with the Government of Malaysia to undertake the constructions and implementation of the project.

(k) In the event that the proposal is accepted by the Government of Malaysia, the first defendant agrees to pay or procure payment to the plaintiff a sum equivalent to 3% of the total contract value of the project awarded to the first defendant.

(l) In the event that the proposal is accepted by the Government of Malaysia, the first defendant shall subcontract and award 20% of the total contract value of the value of the project awarded to the first defendant.

(m) The first defendant whether by itself or through any other party shall not submit or use the proposal and or any rights hereby created to negotiate with and/or submit to the Government of Malaysia any other proposal for the project.

(n) Each party agrees to keep confidential all information obtained from each other pursuant to this Agreement.

(o) Each party shall not divulge, disclose or otherwise furnish to any third party any/all information obtained from each other pursuant to his Agreement.

And relies on a number of cases which had to some extent endorsed the jurisprudence of *Brown v Dunn* rule. To name a few are as follows:

(i) *Aik Ming (M) Sdn Bhd v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639;

(ii) *Sivalinggam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545;

(iii) *Billion Origin v Newbridge Networks (Yap Burgess Rawson International Sdn Bhd, third party)* [2006] 6 MLJ 768; [2006] 4 CLJ 113.

(a) It is a misconceived argument for the first defendant to rely on cl 4.6 of 'memorandum' that the information contained in the proposal is the property of the first defendant. And relies on the grounds of judgment which read as follows:

> Plaintiff telah kemukakan keterangan yang mencukupi untuk establishkan bahawa adalah atas usaha-usaha dan sumbangan plaintiff yang membawa kepada penyediaan Concept Paper dan Cadangan tersebut.

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A Tanpa usaha plaintiff, Concept Paper dan Cadangan tersebut tidak akan dapat disediakan oleh Defendan Pertama. Plaintiff dengan itu tidak boleh dinafikan hak mereka dalam penyediaan Concept Paper dan Cadangan tersebut ...

B (b) The trial judge entered judgment only against the first defendant for breach of the 'memorandum' and conspiring with second defendant to defraud the plaintiff.

[28] The learned counsel for the plaintiff, inter alia, at the conclusion of the C submission says as follows:

Based on the foregoing reasons, we respectfully submit that the findings of the trial judge are supported by cogent evidence in particular, admissions made by SD1 and D1 amongst others, that:

(a) it passed the proposal to D2 (including D3) at their requests and without D obtaining prior written consent from P;

(b) both D2 (including D3) had thereafter submitted CHEC Proposal which was identical to the proposal as their own to the Government of Malaysia;

(c) consequently, D2 (including D3) was awarded a portion of the job under E the project.

We therefore submit there is no reason why the Court of Appeal should reverse the judgment.

[29] We have read the voluminous appeal records and the lengthy F submissions of the parties. We are grateful to the learned counsel for the comprehensive submissions with a note that for a simple issue of breach of memorandum and that too on a specific issue of 'confidential information' it does not warrant at public expense to engage judicial time more than necessary. After much consideration to the learned counsel for the plaintiff we are of the G considered view both the appeals must be allowed. Our reasons, inter alia, are as follows:

(a) We are of the considered view that the learned trial judge, based on pleadings as well as burden of proof, taking into consideration the fairness rule for any adjudicating process, should have dismissed the plaintiffs H claim in limine or should have only dealt with the issue of breach of contract against the first defendant (see *Pertamina v Kartika Ratna Tahir & Ors* [1983] 1 MLJ 136; [1982-1983] 1 SLR 351). Our reasons, inter alia, are as follows:

(i) In the instant case, four defendants were sued and the third and fourth I defendants were not served with the writ and the pleadings were not amended to reflect the action between the first and second defendants only. In consequence, the pleadings will be caught by the prolixity rule and ought to have been directed by the learned judge to be amended and/or struck out in limine. (see *Davy v Garret* (1877) 7 Ch D 473;

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Watson v Rodell 3 Ch D 380; *Cashin v Cradock* 3 Ch D 376; *Lee Ah Lin v Lee Choon Ket & Ors* [2009] MLJU 283; [2012] 2 CLJ 458);

(ii) In addition, it should be dismissed under the rule that the plaintiff should not be allowed to prove its case against non-parties. That too when the pleadings say 'nasty' things against the third and fourth defendants to demean their integrity. (see paras 15 and 16 on issues to be tried). And that too by naming them and not serving on them will in actual fact be abhorrent to notion of justice and fair play. It is the duty of the court to ensure the trial process is not abused whether there was objection or no objection by the party concerned. The trial court should not have lent its stage at all based on fairness rule advocated in the Federal Court case of *Metramac Corporation Sdn Bhd v Fawziah Holding Sdn Bhd* [2007] 5 MLJ 501; [2007] 4 CLJ 725 where Richard Malanjum CJSS observed:

[92] Obviously it was a case of striking at those persons who had no opportunity to defend themselves under a cover of judicial performance. A reminder is thus apposite that it 'can cause great unfairness to third parties if judges make findings of fact or comments which pay no regard to this matter. As a general rule, it is inappropriate, and often unfair, for a judge, in reasons for judgment, to make an unqualified adverse finding concerning someone who is not a party to litigation and who has had no opportunity to answer the allegation in question ... Non-parties can often be seriously damaged by a judge's manner of expressing reasons for judgment. Sometimes this may be the result of mere thoughtlessness. A judge should never cause unnecessary hurt.' (See Aspects of Judicial Performance by Murray Gleeson AC, Chief Justice of Australia).

(iii) there are also a number of Indian cases which has also anchored on the 'fairness rule'. In *Om Prakash Chautala v Kanwar Bhan & Ors* [2014] Indlaw SC 62 though it was related to judicial review proceedings the court made the following observations:

8 In *State of Bihar and another v PP Sharma, IAS and another*[1], this Court has laid down that the person against whom mala fides or bias is imputed should be impleaded as a party respondent to the proceeding and be given an opportunity to meet the allegations. *In his absence no enquiry into the allegations should be made, for such an enquiry would tantamount to violative of the principles of natural justice as it amounts to condemning a person without affording an opportunity of hearing.* (Emphasis added.)

(iv) Section 101 of the Evidence Act 1950 states:

101 (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

Technically without amending the pleadings we do not see how the plaintiff could have proved each and every head of the pleadings where

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the third and fourth defendants have been dragged into but not served. It would have been different if it is a claim in contract against the principal borrower and the guarantor and if one of the parties is not served the action can still proceed against the other. We must say that it is an elementary principle of pleadings that he who alleges must prove its case by evidence against the parties to the suit and not against non-parties. It also stands as a cardinal rule under the Evidence Act 1950. That rule cannot be compromised by the plaintiff relying on *Brown v Dunn* rule per se. The plaintiff must first establish its case according to the pleadings as well as burden of proof and also establish the elements of the cause of action relating to contract or tort as this case may demonstrate. Support for the proposition is found in a number of cases. To name a few are as follows: (i) *Lee Ing Chin @Lee Teck Seng v Gan Yook Chin* [2003] 2 MLJ 97; [2003] 2 AMR 357; (ii) *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; *Buncho (M) Sdn Bhd v Q-Stationers Sdn Bhd* [2010] 7 CLJ 359].

[30] Notwithstanding our observations above, we have dealt with this appeal according to the merits of the case only and not on the procedural shortcomings stated above.

[31] On the issue of 'confidential information' we have perused the pleadings and we are not able to identify what was handed over by the plaintiff to the first defendant under the cover of 'information' or 'confidential information'.

[32] To trigger cl 7 of the 'memorandum' it is essential to disclose by way of pleadings what 'information' which was disclosed was breached. We have perused the pleadings several times but we were not able to identify the precise 'information' which was said to be breached. The word 'information' has a specific meaning and jurisprudence. All statements or correspondence made by the plaintiff will not qualify as 'information'. Neither will a part of the proposal per se will qualify as information. In addition, 'information' per se will not be entitled to 'confidential' status in relation to the memorandum. The statement of claim should define with some precision the information or communication which is alleged to be confidential (see *Diamond Tylus Co Ltd v Bauden Precision Diamonds Ltd* [1972] FSR 177). The usual form of relief in an action for breach of confidential information includes a declaration as to the confidentiality (see *Industrial Furnaces v Reeves* [1970] RPC 605). In essence, the trial court must first identify the 'information' which has the characteristic of confidentiality and then proceed to consider whether the exception stated in cl 7 will apply and then proceed to consider whether there was a breach. We have perused the judgment of the learned trial judge several times but we were not able to identify the finding on the 'information', whether it had the characteristic of confidentiality and whether it was breached. Failure to do so will necessarily compromise the integrity of the decision making process and

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the judgment will stand as perverse. All subsequent findings resulting from the failure will have no value to the decision making process itself. In *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 the court had this to say:

> *Breach of confidence*
>
> (1) It was essential in a breach of confidence action that the plaintiff should give full and proper particulars of all the confidential information on which he intended to rely for two reasons: first, the plaintiff usually sought an injunction and, unless the confidential information was properly identified, an injunction would be of uncertain scope and might be difficult to enforce; secondly, the defendant must know what case he had to meet as he might wish to show that certain of the items relied on were matters of public knowledge. The absence of proper particulars could compromise a defendant's ability to defend himself if the plaintiff could rely on matters of which no proper warning was given. If the plaintiff failed to give proper particulars it was open to the court to infer that the purpose of the litigation was harassment rather than protection of the plaintiff's rights and the action could be struck out as an abuse of process.
>
> *John link & Co Ltd v Wilkinson* [1973] RPC 717, *John Zink & Co Ltd v Lloyds Bank Ltd* [1975] RPC 385, *PA Thomas & Co v Mould* [1968] 2 QB 213 and *Suhner & Co AG v Transradio Ltd* [1967] RPC 329 referred to.
>
> (2) It can equally be an abuse of process to give proper particulars of information which was not, in fact, confidential because a claim based even in part on wide and unsupportable claims of confidentiality could be used as an instrument of oppression or harassment against a defendant and there was a risk that the more technology that was put in issue the more likely it was that the court would jump to the conclusion that some of what had been copied was confidential.

[33] Even on the issue of proposal, it is clear from cl 4.6 it has nothing to do with confidentiality or tied down to cl 7. In addition, cl 7.2(c) which says written authorisation is necessary will not cover proposal, or part thereof unless the plaintiff identifies the 'information' and claims it was breached according to rules of pleadings as well as law as we have set out earlier. The learned trial judge in her judgment had failed to make out this distinction in the judgment and in consequence the construction of clauses complained off had resulted in perverse decision which warrants appellate intervention.

[34] The principles of construction of contract are well settled, and very importantly the construction of the contract is a question of law (see *National Coal Board v Wim Neil & Son (St Helens) Ltd* [1984] 1 All ER 555).

[35] After perusal of cll 1.1, 3, 4.6, 5, 7 and other parts of the 'memorandum', we are of the considered view that the plaintiff has failed to prove its case against the first and second defendants.

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[36] For reasons stated above the appeals of the first and second defendants are allowed with costs and the judgment of the High Court is set aside.

Appeals allowed and decision of the High Court set aside.

Reported by Ashok Kumar